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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-23

ROBERT WORLEY,
Petitioner,

v.

DONALD H. WHALEY, CLARENCE T. HUNTER, SUZANNE HART, JOHN A. SCHICKER, JR., and MAYOR JAMES CONWAY, Comprising the Board of Police Commissioners, St. Louis, Missouri,
Respondents.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the decision and order of the Metropolitan St. Louis Board of Police Commissioners is supported by evidence on the record. Petitioner was aware that the report he was ordered to make was for internal use only and would not be used in any criminal proceedings against him thereby affording petitioner all rights and privileges guaranteed by the United States Constitution.

2. Whether the privilege against self-incrimination provided in the Fifth Amendment to the United States Constitution as incorporated through the Fourteenth Amendment to the United States Constitution requires that before a police officer can be dismissed for failure to make a report concerning his official duties as ordered, he must be clearly and specifically advised that the report is sought only for use by the Department and will not be used against him in subsequent criminal proceedings.

STATEMENT OF THE CASE

This controversy arises out of the investigation of an incident on March 2, 1977, at Highway 40 and Vandeventer in the City of St. Louis. The incident involved the alleged assault on two individuals by members of the St. Louis City Police Department. As a part of their investigation of the incident the Internal Affairs Division of the Metropolitan St. Louis Police Department interviewed numerous policemen and attempted to obtain statements for both internal investigative purposes and for the purpose of preparing criminal charges against certain Officers.

Robert Worley, the Petitioner herein, was called before Sergeant Allen Wagner of the Internal Affairs Division and was informed that Internal Affairs wanted a report from him concerning his knowledge and involvement in the incident. Officer Robert Worley was advised at that time that he might wish to have his attorney present and to consult with him prior to making a statement.

There is a factual dispute as to whether Officer Worley was read the information contained on "The Internal Affairs Rights Card". The "Rights Card" in its entirety states:

> "I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the Constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which could result in your dismissal from the Police Department.
>
> If you do answer, neither your statement nor any other evidence which is gained by reason of such statement can be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent departmental charges."

When Sgt. Wagner requested that petitioner prepare a report for Internal Affairs he refused on his Fifth Amendment grounds. Sgt. Wagner then took petitioner before Captain Julian Boyd, who gave him a direct order to prepare a report relating to the Highway 40 incident. Captain Boyd did not advise Officer Worley of his "internal rights". Petitioner was thereafter taken before Major William E. Brown, Deputy Inspector of Police, and was ordered to furnish a police report regarding the incident under investigation. Petitioner again invoked his Fifth Amendment rights. Major Brown did not advise Appellant of his "internal rights".

Petitioner was thereafter charged under police department disciplinary procedures with a violation of Rule 9, Section 9.001 (b) of the Police Manual. Section 9.001 (b) provides:

> "All orders of a superior officer must be observed and obeyed."

A department disciplinary hearing was commenced on August 12, 1977.

During the hearing, Sergeant Allen Wagner of the Internal Affairs Division was asked by counsel for the Board of Police Commissioners, David Danis, whether he had read the information contained on the "Rights Card" to petitioner Robert Worley. Sgt. Wagner states,

> "And at that time I recall I read a 'Rights Card', an Internal Affairs 'Rights Card' to him."

Mr. Danis then asked, "You read both sides?" Answer: Yes, Sir." On cross-examination petitioner's attorney C. John Pleban stated:

> "Well suppose I would suggest to you that I did not hear you read that card. Would that in any way refresh your recollection as to whether or not in fact the card was read by yourself to Officer Worley?"
>
> Answer: "It is possible."
>
> Question: "So it is possible you did not read him that card?"
>
> Answer: "Yes."
>
> Question: "At least in my presence?"
>
> Answer: "Yes."

Sergeant Wagner explained his uncertainty stating it was his recollection that he had read petitioner his "internal rights" but that since he had no written notation concerning the issue, he could not be absolutely certain. Attorney Pleban did not offer to testify concerning his own recollection of the conversation.

Officer Worley testified on his own behalf at the Hearing. On cross-examination by Attorney Danis, Petitioner was asked whether he was familiar with the regulations concerning his

rights while being questioned by Internal Affairs. Officer Worley admitted he had read the passage concerning those rights as contained in the Manual of the Board of Police Commissioners while in the Police Academy. Attorney Danis asked Petitioner whether he had been advised by his own attorney that if he refused to make a statement to Internal Affairs, relying on his Fifth Amendment rights, and was thereafter ordered to make a statement, that it could not subsequently be used against him in a criminal proceeding. Petitioner refused to answer this question on advice of his attorney.

At the conclusion of the hearing petitioner was found guilty of the charges and he was discharged from the Metropolitan St. Louis Police Department.

No criminal charges were ever brought against petitioner nor did he appear in any criminal proceeding connected with the alleged assault of March 7, 1977.

ARGUMENT

I. No Conflict Is Shown With Any Decision of the United States Supreme Court or Any Decision of a United States Court of Appeals. The Decision of the Missouri Court of Appeals, Eastern District, Follows Well Established Principles of Constitutional Law as Applied to Statements and Reports Required of Police Officers in Connection With the Performance of Official Duties.

Petitioner raises two principal issues in his petition for writ of certiorari. Petitioner argues that he was not informed prior to being disciplined that the statements or reports sought by the Metropolitan St. Louis Police Department were for internal use only and would not be used against him in any possible subsequent criminal prosecution. Second, Petitioner argues that the alleged failure of the Internal Affairs Division of the Metropolitan St. Louis Police Department to advise him of these rights precludes his dismissal for failure to obey a direct order requiring him to make a report of his actions. Appellant is mistaken in both contentions.

At the Administrative Hearing convened to discipline Petitioner, Sgt. Allen Wagner of the Internal Affairs Division was asked by Board Attorney David Danis whether he had read the information contained on the "Internal Rights Card" to the Petitioner. Sgt. Wagner stated he recalled reading the information contained on that "Rights Card" to the petitioner. On cross-examination by petitioner's Attorney, C. John Pleban, Sgt. Wagner admitted it was possible that he might not have read him the information contained on the card. Sgt. Wagner later explained the apparent inconsistency by stating he could not be absolutely certain he had read petitioner his "internal rights" because he had made no written notation or memorandum. It was, however, his "best recollection" that he had read the rights to petitioner Furthermore, during the entire

proceeding, petitioner had the benefit of having his counsel present for advice and consultation. Petitioner admitted that he had read that portion of the Police Manual pertaining to the Internal Rights of a Police Officer while a cadet in the Police Academy. Furthermore, petitioner refused to answer when asked at the hearing whether he had been advised by his own attorney of his rights with respect to this requested statement. Respondents, therefore, deny most vigorously that the evidence and testimony presented failed to establish whether petitioner understood his internal rights at the time of his refusal to make a statement. Assuming, however, only for the purposes of argument in this Brief, that petitioner was not specifically read the information contained on the "Internal Rights Card" prior to being disciplined for refusal to give a statement, it is respondent's position that the department is not required to read petitioner's "rights" to him prior to demanding a report.

Petitioner claims that before a Police Officer or other public servant can be dismissed for failure to make a statement concerning the performance of his official duties, he must be specifically and clearly advised of his rights by reading a printed card in much the same manner that "Miranda" rights must be read to suspected criminal defendants. Respondent contends there is no support for this position. Appellant cites three cases as authority: *Confederation of Police v. Conlisk*, 49 F. 2d 891 (7th Cir. 1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968). Petitioner would have this Court believe that these three cases stand for the proposition that as a condition precedent to a Police Officer making a statement in a department police investigation, the Officer must be clearly advised that his statement is being sought only for internal investigative purposes, and it will not be used against him in any possible subsequent criminal prosecutions.

In *Gardner*, supra, a policeman was subpoenaed before a Grand Jury investigating alleged bribery and corruption of

Police Officers in connection with unlawful gambling operations. The Officer was asked to sign a "Waiver of Immunity" of his Fifth Amendment Rights. He was told that if he failed to waive these rights and refused to testify before the Grand Jury, he would be discharged. The Officer refused to sign the Waiver and was discharged after an Administrative Hearing. The Supreme Court, citing their earlier decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967), held a public servant, specifically a police officer, could not be discharged from office for refusing to relinquish the protection afforded by the privilege against self-incrimination. The Court noted the officer was dismissed solely for his refusal to waive his Fifth Amendment privilege against self-incrimination while appearing before a criminal tribunal. Justice Fortas speaking for the Court states at 392 U.S. 273, 278:

> "If Appellant, a policeman, had refused to answer questions directly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a *criminal prosecution of himself, Garrity v. New Jersey*, the privilege against self-incrimination would not have been a bar to his dismissal." (Emphasis added.)

Justice Fortas further states at p. 79:

> "It is clear that Petitioner's testimony was demanded before the Grand Jury in part so that it might be used to prosecute him, not solely for the purpose of securing an accounting of his performance of his public trust."

Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968), was decided at the same time as *Gardner*, supra, and Justice Fortas again overturned the dismissal of a public employee. In *Uniformed Sanitation Men*, supra, a Grand Jury was investigating charges that certain City employees were failing to charge City "Cartmen" for services rendered

or were pocketing money received without accounting for the funds to the City. Each of the Petitioners was summoned before a City Commissioner and advised his refusal to testify before the Grand Jury with respect to his conduct would result in his dismissal. The Appellants in *Uniformed Sanitation Men*, supra, were clearly asked to waive their Fifth Amendment rights while testifying before a criminal tribunal investigating charges directly related to their conduct. Justice Fortas states at 392 U.S. 280, 283 and 284:

> "Petitioners were not discharged merely for refusal to account for their conduct as employees of the City. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion despite their constitutional privilege. They were *asked to sign Waivers of Immunity before a Grand Jury*. Twelve were told that their answers *could* be used against them in subsequent proceedings, and were discharged for refusal to answer the questions on that basis." (Emphasis ours)

In *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973), Appellants were Chicago Police Officers subpoenaed to appear before a Grand Jury investigating allegations of criminal conspiracy and corruption within the Chicago Police Department. As each police officer appeared, he was advised that whatever he said could be used against him, and was also advised of his Fifth Amendment privilege against self-incrimination. Each refused to testify. Thereafter, the Internal Affairs Division summoned each Officer and asked whether each had invoked the privilege against self-incrimination while appearing before a Grand Jury. The Appellant Officers were suspended for their refusal to testify before the Grand Jury. The dismissals were

set aside by the 7th Circuit Court of Appeals in reliance on *Garrity*, supra, and *Uniformed Sanitation Men*, supra.

In each of the foregoing cases the public official was asked to testify before a Grand Jury. In each case the public official was discharged not because he refused to give a statement concerning his official duties and conduct as part of an internal investigation concerning performance of his official duties, but was fired for failure to waive well-established constitutional privilege against self-incrimination when appearing before a crminal investigatory body involved in the investigation of charges related to the individual's conduct. There is no doubt that had Petitioner Worley been fired for failure to testify before a St. Louis Grand Jury convened to investigate the incident involving the alleged beating, that his Court under the *Gardner* and *Uniformed Sanitation Men* decisions would be required to overturn that dismissal. However, Officer Robert Worley was not before a Grand Jury, but was ordered to give his report to an Officer of the Internal Affairs Division of the St. Louis Police Department as part of the Police Department's own investigation of the matter. In *Conlisk*, at 489 F.2d 891, 893, the Court states:

> "This Court has never held . . . that a policeman may not be discharged for refusal in a disciplinary proceeding to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent proceeding . . ."

Petitioner would have this Court equate his knowledge that an investigation of alleged criminal action of police officers was being conducted by the Internal Affairs Division with the situation presented the police officers in *Conlisk*, supra, and *Gardner*, supra, petitioner asks this Court to expand the Supreme Court holdings and the holdings of the 7th Circuit into an area they were not intended to cover. A police officer can be required to choose between the right to remain silent and his job if the information requested concerns official duties and the officer

is not before a criminal tribunal. Appellant was not disciplined for a refusal to testify before a Grand Jury as in *Garrity*, supra, *Conlisk*, supra, and *Uniformed Sanitation Men*, supra.

In addition, petitioner alleges because statements given by other police officers in connection with the investigation of the assault incident were utilized in a Grand Jury investigation into possible criminal activity, that somehow petitioner's Fifth Amendment rights were in jeopardy. It is clear following *Garrity*, supra, *Gardner*, supra, and *Uniformed Sanitation Men*, supra, that police officers and other public servants are afforded the Fifth Amendment privileges against self-incrimination. Petitioner was ordered to make his report concerning his knowledge of events surrounding an alleged beating. No criminal charges were brought against Petitioner, nor was he subpoenaed to appear before any Grand Jury. An unsubstantiated "fear" that despite contrary assurances, his statement might be used in a criminal proceeding raises no issue for this Court to decide. Petitioner seems to be saying that the officers of the Metropolitan Police Department are so unworthy of belief that to make an officer give any report whatsoever is a violation of his constitutional privilege against self-incrimination. Not a single authority exists for this proposition, nor are any cited by Petitioner.

If Petitioner had given a statement after being informed that the information contained in that statement could not be used against him in a subsequent criminal proceeding, and if the statement was later introduced in criminal proceedings against petitioner then his Fifth Amendment rights would be at issue. This is not the situation before this Court. There is not a scrap of evidence that Petitioner was compelled to make any statement incriminating or otherwise which was subsequently used in a criminal proceeding. His unfounded "fear" that despite assertions to the contrary, any statement he did give would indeed be used against him does not elevate Petitioner's situation to those before this Court in *Garrity*, supra, *Uniformed Sanitation*

Men, supra, or *Conlisk*, supra. Petitioner's constitutional rights could be completely protected in any subsequent criminal proceeding by a motion to suppress his statement. His unfounded assertion that the statement might be used does not create a constitutional issue for this court to decide.

CONCLUSION

For the reasons stated respondents respectfully request this Court refuse to issue a Writ of Certiorari.

Respectfully submitted,

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